February 27, 1996

(b)(6)

(Your January 24, 1996 Letter)

Dear (b)(6):

On December 21, 1995, you filed a Freedom of Information Act (FOIA) request with this office. You requested "[r]ecords that reflect or relate to legal proceedings of which (b)(6) has been the subject individually in the course of the discharge of his duties at the NCUA." Richard Schulman, NCUA's FOIA Officer, denied the request pursuant to exemption 6 of the FOIA on January 5, 1996. We received your January 24 appeal on January 29, 1996. Your appeal is denied pursuant to exemption 6 of the FOIA as explained below.

Exemption 6

Exemption 6 of the FOIA permits NCUA to withhold all information about an individual in "personnel and medical files and similar files" where the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 USC 552(b)(6). The courts have held that all information which applies to a particular individual meets the threshold requirement for exemption 6 protection. United States Department of State v. Washington Post Co., 456 U.S. 595 (1982). Records of legal proceedings concerning (b)(6) and the discharge of his duties at NCUA clearly meet the threshold for exemption 6 protection. You state in your appeal that exemption 6 cannot apply to claims that are already a matter of public record. In United States Department of Justice v. Reporters Committee, 489 U.S. 749 (1989), the court held that there can be a strong privacy interest in certain records even where the information may have been at one time public. Such records can be withheld from disclosure pursuant to exemption 6 of the FOIA. We believe that (b)(6) has a privacy interest in records of the legal proceedings requested, even though the records may be available to the general public through some less accessible source.

Once a privacy interest is established, application of exemption 6 requires a balancing of the public's right to disclosure against the individual's right to privacy. Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976). The public interest in the information is to "shed light on an agency's performance of its statutory duties." Reporters

Committee at 773. The burden of establishing that disclosure would serve the public interest is on the requester. Carter v. United States Department of Commerce, 830 F.2d 388, 391 (D.C. Cir. 1987). The court in Reporters Committee held that the interest of the individual FOIA requester is not to be considered in the balancing. The privacy interest of the individual is to be balanced against the public interest generally in disclosure. 489 U.S. at 771-772. We concede that there may be some public interest to balance against privacy interest. There is a public interest in how agency officials are doing their jobs. However, the caselaw interpreting exemption 6 clearly favors non-disclosure in the balancing test. Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 984). Although courts have held that proven wrongdoing of a serious and intentional nature by a high level government official is of sufficient public interest to outweigh the privacy interest of the official (*see* Cochran v. United States, 770 F.2d 949, 956-57 (11th Cir. 1985)), courts have also held that any general public interest in mere allegations of wrongdoing does not outweigh an individual's privacy interest in unwarranted association with such allegations (*see* McCutchen v. HHS, 30 F.3d 183, 187-189 (D.C. Cir. 1994). There have been no findings of wrongdoing by .

We believe the balance of (b)(6) privacy interest against any public interest is clearly in favor of his privacy. In order to fully protect (b)(6) privacy interest, all responsive records are withheld pursuant to exemption 6. Release of redacted records would not provide adequate privacy protection. Since the records requested only concern , and the records may be available from some other source, once a portion of the records are disclosed, they could be located elsewhere, and all privacy protection would be lost. Courts have held that redaction is a pointless exercise and would defeat privacy protection where the documents requested concern the privacy interests of one or a very limited number of individuals. Alirez v. NLRB, 676 F.2d 423, 427 - 428 (10th Cir. 1982).

Vaughn Index

In addition to appealing the denial of your FOIA request, you asked for a list of responsive records covered by the request and a specific indication of which records will be withheld because of a particular exemption. This is typically known as a Vaughn index. With regard to the timing of the creation of a Vaughn Index, it is well settled that a requester is not entitled to a Vaughn index during the administrative process. *See* e.g. Schaake v. IRS, No. 91-958, slip op. at 7-8 (S.D. Ill. June 23, 1992). The only statutory requirement applicable to an administrative agency under FOIA is that the requester be informed of the decision to withhold along with the underlying reasons. *See* 5 USC 552(a)(6)(A)(i) and Judicial Watch, Inc. v. Clinton, 880 F.Supp. 1, 11

(D.D.C. 1995). Courts do not generally require the submission of a Vaughn index prior to the time at which a dispositive motion is filed (normally defendant agency's motion

for summary judgment). Efforts to compel a Vaughn index prior to that time are typically denied as premature. Miscavige v. IRS, 2 F3d 366, 369 (11th Cir. 1993). We note further that identifying the records requested in a Vaughn index would defeat the use of the privacy exemption. In order to protect (b)(6) privacy interest, we cannot identify the specific records requested.

Pursuant to 5 U.S.C. 552(a)(4)(B), you may seek judicial review of this determination by filing suit to enjoin NCUA from withholding the documents you requested and to order

production of the documents. Such a suit may be filed in the United States District Court in the district where you reside, where your principal place of business is located, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

Sincerely,

Robert M. Fenner

General Counsel

GC/HMU:bhs

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